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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/837,234	04/18/2001	David Klug	88265-4026	1401

28765 7590 10/24/2003

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EXAMINER

TRAN LIEN, THUY

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 10/24/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/837,234	KLUG ET AL.	
	Examiner	Art Unit	
	Lien T Tran	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 September 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 3-23 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 and 3-23 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other: _____ |

Claims 10, 22 and 23 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The process in claim 23 is not supported by the original disclosure. There is no disclosure in the specification that "a portion of the mass flows to conform to the shape of the sugar wafer". Whether the mass will flow to conform to the shape depends on factors such as the viscosity of the mass and the shape of the wafer. The specification does not disclose anything about modifying the viscosity and the shape of the wafer to cause the mass to flow and conform to the shape. There is also no disclosure of the shape being sufficiently solid under ambient temperature or the confectionery mass being harden under ambient condition. The limitation of claim 22 is not found in the specification. The specification does not disclose any temperature with respect to the confectionery mass.

Claims 1 and 3-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Conti et al in view of Boehm et al.

Conti et al disclose sugar wafers. The wafers may have a variety of shapes and sizes e.g.; they may be flat sheets, cup, cone-shaped, or tubular. They may be used in a variety of confectionery products together with confectionery materials such as chocolates or other fatty material such as fat-based cream. A moisture barrier may be used between the surface of the sugar wafer and the other confectionery material; the

barrier is preferably chocolate or chocolate substitute. The confectionery material preferably has a low water activity of below .3. Example I discloses the wafer tube is filled with a fat-based cream containing yoghurt. The wafer product may be enrobed with another suitable confectionery material such as plain, white or milk chocolate or with chocolate substitute. (See pages 4-5)

Conti et al do not disclose the size, the step of allowing the confectionery to harden, the inclusion of edible inclusions, the amount and type of vegetable fat in combination with chocolate and the material being solid or harden under ambient temperature.

Boehm et al disclose a filled cookie which contains an oil based interior filling. The oil filling contains nut paste in combination with chocolate. (see col. 6 lines 1-10)

It would have been obvious to one skilled in the art to use any type of filling material in the wafers disclosed by Conti et al. The types of filling material that are used vary among individual depending on the flavor, taste, texture etc... desired. The filling material claimed is known in the art as shown by Boehm et al; it would have been obvious to one to use such filling if such taste is wanted. As to the filling being solid under ambient condition, this condition varies with the different type of filling and can be readily determined by one skilled in the through routine experimentation. If the product will be stored under ambient condition and a solid filling is desired, it would have been obvious to make a filling which is solid under ambient condition. It would also have been obvious to allow the confectionery material to harden if a solid mass is desired. For example, if one desires the taste of a solid mass, it would have been obvious to

allow the confectionery material to harden or if one wants the taste of a liquid confectionery, it would have been obvious to do the opposite. It would have been obvious to make the product in any size because Conti et al teach the sugar wafers may have a variety of sizes. It would also have been obvious to add edible inclusions to give extra taste and flavor. As to allowing the confectionery material to take the shape of the wafer, it would have been obvious to one skilled in the art to adjust parameters, such as viscosity, temperature at which the material is filled into the wafer, the amount of filling material and the shape of the wafer, to allow the filling material to take the shape of the wafer when such design is wanted. It would also have been obvious to make the confectionery material to have a dome shape to give the look of an ice cream to enhance the novelty of the product since Conti et al disclose the wafer may have a cone-shape and cone shape wafer is commonly associated with ice cream.

The declaration filed July 31, 2003 is not found to be persuasive. Paragraph 6 of the declaration states the term "molten" encompass a flowable confectionery mass that would conform to the object into which it is placed. This statement is a conclusion that is not supported by factual evidence. The declaration does not have any showing to demonstrate that a molten material will conform to the object into which it is placed. For example, a liquid creamy material is a molten material; will this cream conform to the shape of a flat wafer when it is placed into such wafer? The declaration also state that "it is clear to me that ambient conditions are used when nothing else is specified". This statement is also a conclusion without the support of factual evidence. The declaration does not have any evidence to show that every person skilled in the art will

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know that when a temperature is not specified, then ambient conditions are used. With regard to the comments about the teaching of Conti, the examiner maintains her position as set forth in the above rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T Tran whose telephone number is 703-308-1868. The examiner can normally be reached on Tuesday, Wednesday and Friday. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

October 17, 2003

Lien Tran
LIEN TRAN
PRIMARY EXAMINER
Group 1761